

1732677 (Migration) [2021] AATA 796 (8 January 2021)

DECISION RECORD

DIVISION:	Migration & Refugee Division
CASE NUMBER:	1732677
COUNTRY OF REFERENCE:	Thailand
MEMBER:	Hugh Sanderson
DATE:	8 January 2021
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal remits the application for a Partner (Temporary) (Class UK) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 820 (Spouse) visa: • PIC 4007(2)(b) for the purposes of cl.820.223 of Schedule 2 to the Regulations.

Statement made on 08 January 2021 at 2:37pm

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 – transgender female – HIV infection – specific medication not available in Thailand – applicant did not meet the health criteria – long-term genuine relationship – significant emotional distress – requirements of PIC 4007(1)(c) should be waived – decision under review remitted

LEGISLATION

Migration Act 1958, s 65

Migration Regulations 1994, r 2.25; Schedule 2, cl 820.223, Public Interest Criterion ('PIC') 4007, Schedule 4

CASES

Bui v MIMA (1999) 85 FCR 134

Ramlu v MIMIA [2005] FMCA 1735

Robinson v MIMIA (2005) 148 FCR 182

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 378 of the Migration Act 1958 and replaced with generic information.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 3 December 2017 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
2. The visa applicant applied for the visa on 23 April 2016. The delegate refused to grant the visa as the applicant did not satisfy cl.820.223 of Schedule 2 to the Migration Regulations 1994 (the Regulations) because the health criteria in Public Interest Criterion ('PIC') 4007 of Schedule 4 to the Regulations was not met.

Background

3. The applicant identifies as a transgender female. Although she is referred to as a male in the Department's decision and records, the Tribunal has used female pronouns to identify her in this decision.
4. The applicant was born in Thailand and is currently [age] years old. Her parents, a stepbrother and a sister continue to live in Thailand. She is sponsored in the application by [Mr A] who was born in New Zealand and is currently [age] years old. He is an Australian citizen. His father and two sisters reside in New Zealand.
5. The parties claimed they first met each other when the sponsor was on a holiday in Thailand [in] February 2010. It is claimed they continued to communicate with each other when the sponsor returned to Australia. The sponsor travelled to Thailand [in] May 2010 and returned to Australia [in] June 2010. It was claimed that the parties committed to a de facto relationship with each other when the sponsor arrived in Thailand on that trip. The sponsor again travelled to Thailand in July 2010. The parties registered their relationship in NSW [in] March 2015.
6. The applicant first entered Australia [in] December 2010 holding a Tourist visa. Since then she has travelled out of Australia as follows:
 - From [date] January 2011 to [date] June 2011;
 - From [date] November 2011 to [date] August 2012;
 - From [date] September 2012 to [date] December 2012;
 - From [date] March 2013 to [date] December 2013;
 - From [date] March 2014 to [date] April 2014;
 - From [date] July 2014 to [date] November 2014;
 - From [date] April 2015 to [date] November 2015; and
 - From [date] February 2016 to [date] February 2016.
7. As part of the assessment to meet the criteria for the grant of the visa, the applicant was required to undergo health check. The Medical Officer of the Commonwealth (MOC) issued a report dated 17 May 2016. This found that the applicant was suffering from an asymptomatic HIV infection. It was found that as a result of her condition, she would likely require medical services and pharmaceuticals which would be likely to result in a significant cost to the Australian community. The likely costs assessed for pharmaceuticals was \$715,000 and medical services were assessed at \$71,500. This gave an estimated total cost

of \$786,500. Based on this assessment, the applicant was found to not meet the health criteria in PIC 4007(1)(c).

8. The applicant provided a number of documents in support of the claim that the health requirement should be waived. This included statements from the parties, financial information and letters from the applicant's treating doctors.
9. The delegate who considered the application noted the following:
 - The parties had been assessed as being in a genuine relationship which is the basic requirement for the grant of the visa;
 - The applicant and the sponsor did not have any close family ties in Australia;
 - There was little information provided about any community ties the parties had in Australia;
 - The sponsor had lived primarily in Australia since 1996 and became an Australian citizen in 2015;
 - There did not appear to be any impediment for the parties to live together in New Zealand;
 - The sponsor has also been diagnosed with HIV;
 - Despite being granted permission to work in Australia, the applicant had not worked in Australia and has not displayed any skills or qualifications which would gain her ready employment;
 - The sponsor claimed to have an income of approximately \$95,000 per annum and savings of about \$80,000 and;
 - There is little information which would indicate that the parties would be able to offset or mitigate the medical costs as assessed by the MOC.
10. Based on these findings, the delegate was not satisfied that the granting of the visa would be unlikely to result in undue cost to the Australian community and therefore was not willing to waive the criteria pursuant to PIC 4007(2). Accordingly, the delegate found the applicant did not meet the criteria in cl.820.223 and refused the application.

Information to the Tribunal

11. The applicant requested a further report from the MOC, noting the change in policy that the costs should be assessed for a period of up to a maximum of 10 years.
12. The MOC issued a further assessment dated 6 December 2019. Noting the applicant was suffering from an asymptomatic HIV infection, the MOC found the applicant did not meet the health requirements. The medical services were assessed at \$15,000 with pharmaceutical costs of \$120,000 giving a total cost of \$135,000. In coming to that conclusion, the MOC had taken into account a report from the applicant's treating doctor dated 21 November 2019 and the examinations of the applicant from 10 May 2016 and the associated blood tests.
13. The applicant provided further documents in support of the application including the following:
 - Statements by the applicant and the sponsor;
 - Statements by friends and other people including the applicant's employer in support of the applicant;
 - Medical records of the applicant and reports from her treating doctors;

- Information about the treatment of people diagnosed with HIV in Thailand; and
- Financial information as to the applicant and the sponsor.

14. The applicant's agent made submissions where the following was claimed:

- Although a significant cost is defined by the Department is \$49,000, the assessment by the MOC of the costs being \$135,000 is only a small amount of \$86,000 above that amount;
- The excess amount of \$86,000 is not an undue cost;
- The actual costs that the applicant is likely to incur will be less than assessed by the MOC due to her lifestyle and the future reduced costs of the required medication;
- The assessment by the MOC is a "worst case scenario" and the actual costs will be reduced by at least \$15,000;
- The applicant has special skills of employment including as [occupations] and she plans to become a [professional];
- The applicant has not continued studies in English or for any other skills as it is too expensive and she wants to wait until she gets the right to reside permanently in Australia to access subsidised education;
- The applicant was initially employed as [an occupation] and has worked her way up to be a [Occupation 1] and as such, her employer would suffer a major loss if he could not continue employing the applicant;
- There is a shortage of [Occupation 1] in Australia as well as [Occupation 2]s and the applicant obtained a qualification as a [Occupation 2] and worked in Thailand from 2011 to 2014 as a [Occupation 2], although in statements she indicated that she struggled to get any income in this occupation in Thailand;
- The sponsor has savings of about \$40,000 and also owns a home in Sydney (subject to a mortgage) and his income would offset any of the medical expenses incurred by the applicant;
- The sponsor's superannuation is likely to mean that he would have about \$300,000 when he retires which would offset any medical expenses of the applicant;
- The sponsor could not return to live in New Zealand as he has not lived there for 20 years and has no close connections to anyone living in New Zealand;
- The applicant would face the same difficulties in obtaining a Partner visa to live in New Zealand with her HIV status;
- The sponsor would not be able to live or work in Thailand;
- The emotional bonds of the parties are such that any separation would cause increased stress and psychological harm;
- The current COVID-19 pandemic would prevent the parties spending any short time period together if they were in separate countries for many years to come; and
- Thailand has inadequate health care for HIV and also faces problems with tuberculosis, and the specific medication that both the applicant and the sponsor requires to treat their HIV not available in Thailand.

15. The applicant appeared before the Tribunal by video on 7 January 2021 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor. The applicant was represented in relation to the review by her registered migration agent who attend the hearing.

16. The applicant provided details of her relationship with the sponsor. This included where they had been living over the 10 years of their relationship, their activities together, and their relationships with their respective families in Thailand and New Zealand. She provided details of their social activities including the friends they spend time with. She provided details of their financial circumstances. She provided details of the difficulties she envisaged she would face if she were required to return to live in Thailand.
17. The sponsor provided evidence of his relationship with the applicant. He said that he had little social life apart from his life with the applicant and her friends. He said that although he occasionally goes out with his co-workers, he does not spend much time with them and they are not aware of his sexual orientation. He indicated that he has not required counselling or any other help for any depression or anxiety at any time.
18. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

19. The issue in this review is whether the visa applicant meets Public Interest Criterion (PIC) 4007 as required by the criteria for the grant of the visa. Public Interest Criterion 4007, as it applies to this case, is extracted in the attachment to this decision. It requires the applicant, in certain circumstances, to undergo medical assessment and to be free of certain diseases or conditions that may impact on the community. This last requirement may be waived in certain circumstances. The applicant in this case is suffering from an asymptomatic HIV infection.

Is the applicant free from the relevant diseases or conditions (PIC 4007(1)(a), (b), (c))?

20. Clauses 4007(1)(a) and (b) require the applicant to be free from tuberculosis and free from a disease or condition that is, or may result in the applicant being, a threat to public health in Australia or a danger to the Australian community.
21. Clause 4007(1)(c) requires the applicant to be free from a disease or condition which would be likely to require health care or community services or which would meet the medical criteria for provision of a community service during the specified period; and provision of the health care or community services (regardless of whether it will actually be used in connection with the applicant) would be likely to: result in a significant cost to the Australian community in the areas of health care and community services; or prejudice access of an Australian citizen or permanent resident to health care or community services.
22. For specified temporary visas, certain specified health care and community services are excluded from this consideration: PIC 4007(1B). The requirement may also be waived in certain circumstances.
23. As the applicant in this case has applied for a permanent visa, the exemption provision in PIC 4007(1B) does not apply.
24. In determining whether a person meets PIC 4007(1)(a), (b) or (c), r.2.25A requires the Tribunal to seek the opinion of a Medical Officer of the Commonwealth (MOC) unless: the application is for a temporary visa and there is no information known to Immigration to the effect that the person may not meet those requirements; or the application is for a permanent visa and made from a specified country and there is no information known to Immigration to the effect that the person may not meet those requirements. Where an opinion of an MOC is required, the Tribunal must take it to be correct: r.2.25A(3).

Is an MOC opinion required?

25. On the evidence before the Tribunal, an MOC opinion is required. As noted above, the Tribunal must take the MOC opinion as correct, but must first be satisfied the MOC has applied the correct test in forming the opinion: *Robinson v MIMIA* (2005) 148 FCR 182 and *Ramlu v MIMIA* [2005] FMCA 1735. That is, the opinion must identify the medical condition to which the public interest criterion has been applied, and the form or level of the condition suffered by the applicant, and the MOC must have applied the statutory criteria by reference to a hypothetical person who suffers from that form or level of the condition.
26. Two reports have been obtained from the MOC. The first was dated 17 May 2016 and the second was dated 6 December 2019. Both reports found that the provision of health care services that the applicant would require would be likely to result in a significant cost to the Australian community. Both reports concluded that the applicant did not meet the health criteria.
27. Accordingly, based on the opinion of the MOC, the applicant does not satisfy PIC 4007(1)(c).

Should the requirements of PIC 4007(1)(c) be waived?

28. The requirement in PIC 4007(1)(c) to be free of a disease or condition that would impact on health or community services may be waived if, among other things, the decision maker is satisfied that the granting of the visa would be unlikely to result in either 'undue cost' to the Australian community or 'undue prejudice' to the access to health care or community services of an Australian citizen or permanent resident: PIC 4007(2).
29. The evaluative judgment of whether the cost to the Australian community or prejudice to others is 'undue' may import considerations of compassionate or other circumstances: *Bui v MIMA* (1999) 85 FCR 134 ('Bui') at 47. Over and above the consideration of the likelihood that cost or prejudice will be 'undue', there is also the discretionary element of the ministerial waiver. And within that discretion, compassionate circumstances or compelling circumstances may be relevant: *Bui* at 47. Departmental policy guidance on the exercise of this discretion is contained in the Procedures Advice Manual ('PAM3'). Broadly speaking, these relate to: family links in Australia and the impact on family members; occupational skills of the applicant or family members; assets or factors that may mitigate the costs or prejudice to access to care or services involved; available support from family or community groups; potential contribution to Australia by the applicant or family members; the immigration history of the applicant; other compelling and compassionate circumstances including location of the applicant and family members; and any other relevant factors.
30. The applicant's agent has provided lengthy submissions as to various reasons why it is argued that the granting of the visa would not result in undue cost to the Australian community. The Tribunal rejects many of these arguments.
31. The argument that the taxes paid by the applicant and the sponsor would offset any medical expenses of the applicant is a nonsense. The applicant currently earns about \$20,000 per annum and pays little income tax. It is unlikely that she will ever earn significant sums of money or be a major contributor to the Australian income tax system. It is unlikely that she will ever earn a sufficient income whereby her income tax or any financial contribution she makes to the Australian community would meet the costs as assessed by the MOC.
32. Although the sponsor earns above the average income, the claim that his income tax would meet the medical costs of the applicant are naïve. It ignores the fact that the person's income tax meets multiple expenses incurred by the Australian government. This includes the cost of infrastructure, subsidised education (which the applicant states she plans to use

if she is able to become a permanent resident), age pension (which, based on the sponsor's estimate of having \$300,000 in superannuation when he retires, both he and the applicant are likely to access), court infrastructure (including the costs of the Tribunal which is currently being accessed by the applicant) and a multitude of other necessary federal expenses. The sponsor also receives the benefit of the pharmaceutical benefits scheme in the medication that he receives to control his HIV condition. Any income tax the sponsor pays is not likely to offset the expenses of the applicant as assessed by the MOC.

33. The argument that the excess amount of \$86,000 is not an undue cost is also nonsensical. The Tribunal accepts, as referred to by the applicant's agent, the Department's assessment of \$49,000 as being a significant cost. On that basis alone, to argue that an excess of more than 1.75 times that amount is not an undue cost is counterintuitive and plainly wrong.
34. The arguments that the applicant has special skills that are in shortage in Australia is also a nonsense. The applicant obtained a certificate as to [Occupation 2] in Thailand. It is unlikely the certificate would be recognised in Australia. She operated her own shop in Thailand for about four years. This business venture appears to have been unsuccessful based on the statements of the applicant. It is unlikely that her qualifications or previous self-employment as a [Occupation 2] would be recognised in Australia.
35. It is also claimed that she is a qualified [Occupation 1]. She holds no qualifications as a [Occupation 1]. The applicant only commenced employment as an unskilled [low level job] in 2019. Although her employer has allowed her to be engaged in [specific tasks], she only works about 20 hours a week and earns approximately \$20,000 per annum. This does not indicate a person who is a qualified [Occupation 1] or that she would have the experience to be employed as a [Occupation 1].
36. The applicant has also stated that she has no intention to work as a [Occupation 1] or as a [Occupation 2] in the future. She states that she plans to work in [a specified field] however has no qualifications to be able to work in [that area]. The Tribunal is not satisfied that the applicant holds any employment skills that would be in demand in Australia or that the employment skills she does hold mean that the granting of the visa would be unlikely to result in undue cost to the Australian community.
37. The Tribunal also does not accept the argument that the MOC has presented a "worst case scenario" and that the cost of medication for the treatment of HIV will reduce in the future. The estimate put by the applicant's agent was the reduction would be by at least \$15,000. This still means that the likely medical expenses of the applicant will be well in excess of the significant cost of \$49,000 over a 10-year period. Although patents will expire to allow less expensive medication to be used for treatment of HIV, it is also likely that new improved medications will become available, subject patents, which will be approved under the pharmaceutical benefits scheme and which the applicant's treating doctors will likely prescribed for her. It is likely the medical expenses of the applicant, which will be met by the Australian community, will continue for the rest of her life.
38. Despite rejecting these and other submissions made by the applicant's agent, the Tribunal has taken into account the particular circumstances of the relationship between the applicant and the sponsor and the situation the parties would find themselves in if the visa were refused.
39. The sponsor appears to be highly dependent upon the applicant for his emotional well-being. Although he has not sought or obtained any professional medical opinion, his lifestyle indicates a significant dependence upon the applicant. There are few people in the community who are aware of his sexuality. He has not disclosed to his workmates his sexuality or the fact that he suffers from HIV. He does not socialise to any great extent with

his workmates. He does not have any other significant social connections with anyone else in the community apart from those friends and work associates of the applicant. Any significant friends he has are those friends of the applicant in the Thai community in Australia.

40. If the applicant were required to return to Thailand, it is unlikely that the sponsor would be able to live in Thailand with her. The Tribunal accepts that the applicant would not be able to sponsor the sponsor for a permanent visa to live in Thailand. The sponsor has limited financial resources and would be required to work in Thailand. It is unlikely that he would be able to find employment, even if he had the right to do so, and any employment that he could find is unlikely to provide any significant remuneration. The applicant has only limited income earning capacity and the Tribunal accepts that her family would not be able to provide any financial support to the applicant and the sponsor in Thailand. It is noted that the applicant and the sponsor currently provide financial support to the applicant's family in Thailand.
41. Of the nations in Southeast Asia, Thailand is one of the most tolerant towards the LGBTI community. The Department of Foreign Affairs and Trade assessed that the community faces a low risk of official discrimination in that a number of existing laws prevent them from being able to enjoy the full range of rights available to other citizens.¹ The Thai authorities provide relatively good access to medication for people who have HIV infection. The Tribunal acknowledges that the medication, however, is not as advanced as that provided in Australia. This would adversely affect the applicant and the sponsor if they were required to live together in Thailand. The applicant and sponsor are likely to face some degree of discrimination in Thailand due to their sexual orientation, however, the Tribunal does not accept that this would be substantial and places only limited weight on this fact.
42. The Tribunal finds that it would be impossible for the applicant and the sponsor to live together in Thailand. The different medications that would be available to the applicant and the sponsor would adversely affect both of them. Both parties would have difficulties being able to earn an income, assuming the sponsor was able to obtain work rights in Thailand. Both parties would suffer from a low level of discrimination due to their sexuality.
43. The sponsor was born in New Zealand and is a New Zealand citizen. He has not lived in New Zealand for over 20 years. Apart from his immediate family who live in and around a small [town], he has no other connections with any extended family or friends in New Zealand. It is unlikely that he would be able to find comparable employment in New Zealand and certainly not where his family live.
44. The parties have not explored the possibility of the sponsor returning to New Zealand and sponsoring the applicant to live with him there on a Partner visa. It is likely that the applicant would face the same difficulties with regards to the health criteria in obtaining a visa to live with the sponsor in New Zealand. It would be inappropriate to refuse the applicant a Partner visa to live in Australia on the basis that the sponsor could possibly sponsor the applicant for a Partner visa to live in New Zealand if the applicant would face the same difficulties to overcome in relation to the health criteria in the New Zealand application. This is particularly so when the sponsor has lived in Australia for more than 20 years, is an Australian citizen, has limited social contacts in New Zealand and has been working in Australia throughout his life in Australia.
45. The Tribunal has considered all the circumstances of the applicant and the sponsor and whether the expenses as assessed by the MOC would be undue if the visa were granted. Although the case is finally balanced, the Tribunal has concluded that the granting of the visa would be unlikely to result in undue cost to the Australian community. The parties have been

¹ DFAT Country Information Report –Thailand 10 July 2020 at 3.105

in a long-term relationship, with their relationship starting in 2010. The Tribunal accepts that the parties are devoted to each other and will continue their relationship regardless of the outcome of the applicant's visa application. If the visa were refused, it is likely that the sponsor would suffer from significant emotional distress which would adversely affect his capacity to function properly in society. He would become significantly socially isolated.

46. The Tribunal accepts that the parties do not have the option to either live together in Thailand or in New Zealand. The sponsor's own health needs are unlikely to be adequately met in Thailand. It is unlikely that the sponsor would be able to have an immigration pathway to live in Thailand. The sponsor would be significantly financially disadvantaged if he were required to relocate to Thailand. He would also face significant financial disadvantage if he relocated to New Zealand. There is no clear information which would indicate that if the sponsor did relocate to New Zealand, he would be able to successfully sponsor the applicant for a Partner visa.
47. The requirement that the parties are in a genuine relationship is a primary requirement for the grant of the Partner visa. In normal circumstances, the fact that the parties are in a genuine and continuing relationship would not be a matter that the Tribunal would find that the relationship of itself means the granting of the visa would be unlikely to result in undue cost to the Australian community. However, the Tribunal accepts that the particular circumstances of the relationship between the applicant and the sponsor, the impracticality and impossibility of the parties to relocate together to either New Zealand or Thailand, the effect of any separation on the sponsor in his capacity to properly function in Australia, and the difficulties that both the applicant and the sponsor would face with regards to their HIV treatment in Thailand leads the Tribunal to conclude that the granting of the visa would be unlikely to result in undue cost to the Australian community.
48. For these reasons, the Tribunal is satisfied that the granting of the visa would be unlikely to result in undue cost or undue prejudice within the terms of PIC 4007(2)(b). Therefore, PIC 4007(1)(c) may be waived subject to the applicant satisfying all other requirements for the visa.
49. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for the visa.

DECISION

50. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 820 (Spouse) visa:
 - PIC 4007(2)(b) for the purposes of cl.820.223 of Schedule 2 to the Regulations.

Hugh Sanderson
Member

ATTACHMENT

Migration Regulations 1994

Schedule 4

- 4007 (1) The applicant:
- (aa) if the applicant is in a class of persons specified by the Minister in an instrument in writing for this paragraph:
 - (i) must undertake any medical assessment specified in the instrument; and
 - (ii) must be assessed by the person specified in the instrument;unless a Medical Officer of the Commonwealth decides otherwise; and
 - (ab) must comply with any request by a Medical Officer of the Commonwealth to undertake a medical assessment; and
 - (a) is free from tuberculosis; and
 - (b) is free from a disease or condition that is, or may result in the applicant being, a threat to public health in Australia or a danger to the Australian community; and
 - (c) subject to subclause (2) — is free from a disease or condition in relation to which:
 - (i) a person who has it would be likely to:
 - (A) require health care or community services; or
 - (B) meet the medical criteria for the provision of a community service;during the period described in subclause (1A); and
 - (ii) the provision of the health care or community services would be likely to:
 - (A) result in a significant cost to the Australian community in the areas of health care and community services; or
 - (B) prejudice the access of an Australian citizen or permanent resident to health care or community services;regardless of whether the health care or community services will actually be used in connection with the applicant; and
 - (d) if the applicant is a person from whom a Medical Officer of the Commonwealth has requested a signed undertaking to present himself or herself to a health authority in the State or Territory of intended residence in Australia for a follow-up medical assessment — has provided the undertaking.
- (1A) For subparagraph (1)(c)(i), the period is:
- (a) for an application for a permanent visa — the period commencing when the application is made; or
 - (b) for an application for a temporary visa:
 - (i) the period for which the Minister intends to grant the visa; or
 - (ii) if the visa is of a subclass specified by the Minister in an instrument in writing for this subparagraph — the period commencing when the application is made.
- (1B) If:
- (a) the applicant applies for a temporary visa; and
 - (b) the subclass being applied for is not specified by the Minister in an instrument in writing made for subparagraph (1A)(b)(ii);
- the reference in sub-subparagraph (1)(c)(ii)(A) to health care and community services does not include the health care and community services specified by the Minister in an instrument in writing made for this subclause.
- (2) The Minister may waive the requirements of paragraph (1)(c) if.
- (a) the applicant satisfies all other criteria for the grant of the visa applied for; and
 - (b) the Minister is satisfied that the granting of the visa would be unlikely to result in:
 - (i) undue cost to the Australian community; or
 - (ii) undue prejudice to the access to health care or community services of an Australian citizen or permanent resident.